A

LIPUTAN SIMFONI SDN BHD v. PEMBANGUNAN ORKID DESA SDN BHD

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
NALLINI PATHMANATHAN JCA
B ZABARIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1820-10-2015]
13 JUNE 2017

C ***CONTRACT:*** *Agreement – Void – Sale and purchase agreement of land – Impostor company sold land to subsequent purchaser – Agreement entered into by parties had effect of depriving state of revenue – Whether transfer of title to subsequent purchaser predicated on void contract – Whether contract ab initio – Contracts Act 1950, s. 24(b)*

D ***LAND LAW:*** *Indefeasibility of title and interests – Registration – Sale and purchase of land – Impostor company sold land to subsequent purchaser – Whether subsequent purchaser a purchaser in good faith and for valuable consideration – Meaning of 'good faith' – Whether impostor company bare trustee for subsequent purchaser until registration of title – Whether subsequent purchaser entitled to indefeasible title to land – Whether transfer of title to subsequent purchaser* E *predicated on void contract – National Land Code, s. 340*

The respondent ('the plaintiff') was the registered owner of a piece of land ('the land'). In 1996, an impostor company, bearing a name identical to that of the plaintiff, claimed that it had lost the original document of title to the land and applied to the Pendaftar Tanah dan Galian Wilayah Persekutuan F Kuala Lumpur ('PTG') for a replacement. The PTG issued a replacement issue of title to the impostor company even though the original of the same was actually in the plaintiff's possession. The impostor company sold the land to one Chai Sit Trading Sdn Bhd ('CST') and the latter was registered as the owner of the land. In turn, CST sold the land to the appellant G ('the first defendant'). Prior to the second sale of the land, the impostor company entered a private caveat on the land as CST had not settled the balance of the purchase price. CST successfully removed the private caveat. The impostor company then entered a Registrar's caveat on the land. In the meantime, the plaintiff discovered that the land was being cleared and a land H search revealed that CST was the registered proprietor of the land. The plaintiff lodged a police report and notified the PTG. An enquiry, which involved the PTG, the police, the plaintiff, CST and the representatives of the first defendant, took place. Soon after this meeting, CST applied to the High Court to have the Registrar's caveat removed. In the application, PTG I and the first defendant were added as parties but the plaintiff was never informed nor made a party to these proceedings. The entire matter was disposed of without the plaintiff being accorded an opportunity of being heard. The High Court granted CST's application to remove the Registrar's

caveat. The first defendant was later registered as the proprietor of the land on 11 February 2010. In 2012, the plaintiff lodged a private caveat over the land. The High Court allowed the plaintiff's claim on the grounds that (i) the first defendant was not a purchaser in good faith and for valuable consideration and was thus disentitled to an indefeasible title to the land pursuant to s. 340(3) of the National Land Code ('the NLC'); and (ii) the transfer of title to the first defendant was defeasible under s. 340(2) of the NLC as it was predicated on a contract which was void under s. 24(b) of the Contracts Act 1950 ('the CA'). Hence, the present appeal. The issues that arose for the court's adjudication were (i) when was the relevant time to determine whether a subsequent purchaser acquired title 'in good faith for valuable consideration'; (ii) whether good faith simply meant the absence of fraud, deceit or dishonesty or whether a purchaser was under a positive duty to take the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances before it may be considered to be *bona fide*; and (iii) whether the sale and purchase agreement between CST and the first defendant had the effect of depriving the state of revenue and was therefore void *ab initio* pursuant to s. 24(b) of the CA, rendering the first defendant's title defeasible under s. 340(2) of the NLC.

Held (dismissing appeal)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) A prospective purchaser who might well enjoy beneficial ownership of the land, having paid the full purchase price, was not recognised as holding title or becoming the registered proprietor until registration. The vendor, CST, then held the land as bare trustee for the purchaser, the first defendant. The trust arose by the application of equitable principles but did not alter the basic concept of the NLC which treats the purchaser's equity as a claim to an unregistered, although registrable, interest. Therefore, prior to registration, which occurred on 11 February 2010, the first defendant had no title to the land. It remained a purchaser, *albeit* beneficial owner, until registration. Accordingly, its conduct until registration was material for the purpose of ascertaining *bona fide* or good faith. (paras 64 & 65)

(2) The conduct of the first defendant served to obstruct the plaintiff from having its claim to the land ventilated in full. The first defendant acted so as to stifle the plaintiff's claim, particularly in precluding the plaintiff the opportunity to be heard. This amounted to a breach of natural justice. If the court adjudicating on the removal of the Registrar's caveat had been made aware of the plaintiff's claim to the land and the pending police investigation, it remained moot whether the Registrar's caveat would indeed have been removed. The Registrar's caveat was lodged in respect of improper dealing with the land. It could not simply be dismissed as an adverse claim, which did not affect the first defendant's

entitlement to registration. Such conduct clearly did not fall within the definition of a purchaser in 'good faith' or a purchaser who 'dealt honestly' in acquiring registration of the land in its name. (paras 90, 91 & 92)

(3) The first defendant and CST had colluded with each other to evade the payment of real property gains tax on the undeclared profit and payment of stamp duty on the additional consideration. The registration of the first defendant's title was predicated on the second sale and purchase agreement with CST, which sought to deprive the Government of revenue. Therefore, it was void under the CA. As the underlying contract was void, the instrument of dealing effecting the transfer to the first defendant was accordingly void. (paras 95 & 104)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') ialah pemilik berdaftar sebidang tanah ('tanah tersebut'). Pada 1996, sebuah syarikat penyamar, yang mempunyai nama serupa dengan plaintif, mendakwa kehilangan dokumen asal hak milik tanah tersebut dan memohon pada Pendaftar Tanah dan Galian Wilayah Persekutuan Kuala Lumpur ('PTG') bagi penggantian. PTG mengeluarkan isu hak milik kepada syarikat penyamar walaupun, hakikatnya, dokumen asal ini dalam milikan plaintif. Syarikat penyamar menjual tanah tersebut kepada Chai Sit Trading Sdn Bhd ('CST') dan CST didaftarkan sebagai pemilik tanah tersebut. Seterusnya, CST menjual tanah ini kepada perayu ('defendan pertama'). Sebelum jualan kedua tanah itu, syarikat penyamar telah memasukkan kaveat persendirian pada tanah tersebut kerana CST gagal menyelesaikan baki harga belian. CST berjaya menyingkirkan kaveat ini. Syarikat penyamar kemudian memasukkan kaveat Pendaftar pada tanah. Pada masa yang sama, plaintif mendapat tahu bahawa tanah tersebut sedang dibersihkan dan satu carian tanah mendedahkan CST ialah pemilik berdaftar tanah tersebut. Plaintif membuat laporan polis dan memaklumkan PTG. Satu inkuiri, yang melibatkan PTG, pihak polis, plaintif, CST dan wakil-wakil defendan pertama, diadakan. Sejurus selepas mesyuarat ini, CST memohon pada Mahkamah Tinggi untuk menyingkirkan kaveat Pendaftar. Dalam permohonan tersebut, PTG dan defendan pertama dimasukkan sebagai pencelah tetapi plaintif tidak dimaklumkan mahupun dijadikan pihak dalam prosiding tersebut. Keseluruhan hal perkara dilupuskan tanpa memberi plaintif peluang dibicarakan. Mahkamah Tinggi membenarkan permohonan CST untuk menyingkirkan kaveat Pendaftar. Defendan pertama seterusnya didaftarkan sebagai pemilik tanah tersebut pada 11 Februari 2010. Pada 2012, plaintif memasukkan kaveat persendirian atas tanah tersebut. Mahkamah Tinggi membenarkan tuntutan plaintif atas alasan (i) defendan pertama bukan pembeli suci hati dan bagi balasan bernilai dan, dengan itu, hilang kelayakan hak milik tidak boleh sangkal atas tanah, bawah s. 340(3) Kanun Tanah Negara ('KTN'); dan (ii) pindahan hak milik kepada defendan

pertama boleh disangkal bawah s. 340(2) KTN kerana didasarkan pada kontrak yang terbatal bawah s. 24(b) Akta Kontrak 1950 ('AK'). Maka timbul rayuan ini. Isu-isu berbangkit bagi pertimbangan mahkamah adalah (i) bilakah masa relevan untuk menentukan sama ada pembeli terkemudian memperoleh hak milik 'suci hati bagi balasan bernilai'; (ii) sama ada suci hati sekadar bermaksud tiada penipuan, perdayaan atau ketakjujuran atau sama ada pembeli mempunyai tanggungjawab positif untuk mengambil langkah-langkah biasa yang akan diambil oleh pembeli munasabah yang cermat dalam hal keadaan tersebut sebelum dianggap suci hati; dan (iii) sama ada perjanjian jual beli antara CST dan defendan pertama mempunyai kesan menghalang Kerajaan daripada mengutip hasil cukai dan dengan itu terbatal sama sekali bawah s. 24(b) AK, menjadikan hak milik defendan pertama boleh disangkal bawah s. 340(2) KTN.

Diputuskan (menolak rayuan)

Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Bakal pembeli yang mungkin menikmati milikan benefisial tanah setelah membayar penuh harga belian, tidak diiktiraf sebagai memegang hak milik atau menjadi pemilik berdaftar hinggalah dia didaftarkan. Penjual, iaitu CST, memegang tanah tersebut sebagai pemegang amanah bagi pembeli, iaitu defendan pertama. Amanah timbul melalui pemakaian prinsip-prinsip berekuiti tetapi tidak mengubah konsep asas KTN yang menganggap ekuiti pembeli sebagai tuntutan bagi kepentingan yang, walaupun boleh didaftar, belum didaftarkan. Oleh itu, sebelum pendaftaran yang dibuat pada 11 Februari 2010, defendan pertama tidak mempunyai hak milik atas tanah. Dia kekal pembeli, walaupun seorang pemilik benefisial, hingga didaftarkan. Susulan itu, tindakannya hingga pendaftaran material bagi tujuan menentukan *bona fide* atau suci hati.

(2) Tindakan defendan pertama bertujuan menghalang plaintif mencapai tuntutannya iaitu agar tanah tersebut diperiksa sepenuhnya. Defendan pertama bertindak begitu untuk menghalang tuntutan plaintif, khususnya dengan mengecualikan plaintif daripada mendapat peluang dibicarakan. Ini satu pelanggaran keadilan semula jadi. Jika mahkamah yang memutuskan penyingkiran kaveat Pendaftar dimaklumkan akan tuntutan plaintif atas tanah dan siasatan polis yang sedang berjalan, kaveat Pendaftar mungkin tidak akan disingkirkan. Kaveat Pendaftar dimasukkan berikutan urusan tidak wajar atas tanah tersebut. Ini tidak boleh diketepikan semata-mata sebagai satu tuntutan bertentangan yang tidak memberi kesan pada kelayakan defendan pertama untuk berdaftar. Kelakuan begitu jelas tidak tergolong dalam definisi pembeli 'suci hati' atau pembeli yang 'berurusan secara jujur' dalam memperoleh pendaftaran tanah bawah namanya.

(3) Defendan pertama dan CST sama-sama berpakat secara sulit untuk mengelak bayaran cukai untung harta tanah atas keuntungan dan bayaran duti setem bagi balasan tambahan yang tidak diisytiharkan. Pendaftaran hak milik defendan pertama berdasarkan pada perjanjian kedua jual beli dengan CST, yang bertujuan menghalang Kerajaan mengutip hasil cukai. Oleh itu, ini terbatal bawah AK. Oleh kerana kontrak asal terbatal, instrumen urusan yang menguatkuasakan pindah milik kepada defendan pertama turut terbatal.

Case(s) referred to:

Abigail v. Lapin [1934] All ER 720 ***(refd)***
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Assets Co Ltd v. Mere Roihi [1905] AC 176 ***(refd)***
Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***
Bresknar v. Wall (1972) ALJR 68 ***(refd)***
Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***
Carlyle v. Royal Bank of Scotland Plc [2015] UKSC 13 ***(refd)***
Halimah v. Haji Mohamed Din [1940] FMSLR 317 ***(refd)***
Henderson v. Foxworth Investments Limited [2014] UKSC 41 ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***
Lawrence v. Maple Trust Company, 2007 ONCA 74 ***(refd)***
Loke Yew v. Port Swettenham Rubber Co Ltd [1913] AC 491 ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***
Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors [1981] 1 LNS 114 ***(refd)***
Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(not foll)***
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 LNS 96 FC ***(refd)***
Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***
Puran Singh v. Kehar Singh & Anor [1937] FMSLR 1 ***(refd)***
State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA ***(refd)***
Tan Hee Juan v. Teh Boon Keat [1933] 1 LNS 101 HC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Teh Bee v. K Maruthamuthu [1977] 1 LNS 134 FC ***(refd)***
Thong Foo Ching & Ors v. Shigenori Ono [1998] 4 CLJ 674 CA ***(refd)***
Waimiha Sawmilling Co (in liquidation) v. Waione Timber Co Ltd [1923] NZLR 1137 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24(b)
National Land Code, ss. 320(1)(a), 340(2)(a), (b), (3)
Specific Relief Act 1950, s. 26(b)

For the appellant - Mahendran Shunmugan Sundaram & Nadesh Ganabaskaran; M/s Malek, Paulian & Gan
For the respondent - Balbir Singh, Ho Hon Kheong & Premkumar Danapal; M/s Palani Aishah & Co

[Editor's note: For the High Court judgment, please see Pembangunan Orkid Desa Sdn Bhd v. Liputan Simfoni Sdn Bhd & Ors [2016] 1 CLJ 664 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This appeal arises from a suit in the High Court of Malaya at Kuala Lumpur in which the original registered owner of a piece of land, Pembangunan Orkid Desa Sdn Bhd, as plaintiff, brought a suit against:

(i) Liputan Simfoni Sdn Bhd, the first defendant

(ii) Chai Sit Trading Sdn Bhd, the second defendant; and

(iii) The Pendaftar Tanah dan Galian Wilayah Persekutuan Kuala Lumpur, the third defendant;

for, *inter alia*, declarations of rights to the said land and orders for the cancellation of dealings with the said land, on the grounds, *inter alia*, of forgery and a lack of good faith involved in the subsequent registration of title in the name of Liputan Simfoni Sdn Bhd, the first defendant.

[2] The High Court allowed the plaintiff's claim, thereby restoring the subject land to the original owner. The first defendant and the third defendant lodged separate appeals to this court, which were heard together.

[3] We allowed the third defendant's appeal. We unanimously agreed with the Senior Federal Counsel that the learned Judicial Commissioner had erred when he held the third defendant (the Pendaftar Tanah dan Galian Wilayah Persekutuan Kuala Lumpur) liable and that the third defendant owed a duty of care to the plaintiff to inform it of civil proceedings instituted by Chai Sit Trading Sdn Bhd, the second defendant, to remove the Registrar's caveat that had been lodged by the third defendant itself. We concluded that the learned trial judge's finding did not meet the test for the imposition of a duty of care as set out in the case of *Caparo Industries Plc v. Dickman* [1990] 2 AC 605. That decision was followed by the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1, where Steve Shim CJ (Sabah & Sarawak) distilled the test in *Caparo* to the elements of "foreseeability, proximity and the additional requirement of justice, fairness and reasonableness". On the facts before us, we were of the

view that the third defendant owed no such duty of care towards the plaintiff. Therefore, we set aside the learned Judicial Commissioner's finding of liability on the part of the third defendant. There was no appeal by the plaintiff as to our decision in this regard.

[4] However, we dismissed the first defendant's appeal, upholding the decision of the learned judge. That is the subject matter of the present appeal by the first defendant/appellant.

[5] We refer to the parties as follows:

(a) The first defendant, Liputan Simfoni Sdn Bhd who is the appellant as 'the first defendant'.

(b) The plaintiff, Pembangunan Orkid Desa Sdn Bhd who is the respondent as 'the plaintiff'.

(c) The second defendant, Chai Sit Trading Sdn Bhd as 'Chai Sit'.

(d) The third defendant, the Pendaftar Tanah dan Galian Wilayah Persekutuan Kuala Lumpur as 'PTG'.

[6] The primary issues for determination in this appeal, as we see it, are:

(a) Whether the first defendant, who was a subsequent rather than an immediate purchaser, acquired title "… in good faith and for valuable consideration" as set out in the proviso to s. 340(3) of the National Land Code (NLC); and

(b) Whether the sale and purchase agreement between the immediate purchaser, Chai Sit, and the subsequent purchaser, the first defendant, had the effect of depriving the state of revenue and was therefore void *ab initio* pursuant to s. 24(b) of the Contracts Act 1950, rendering the first defendant's title defeasible under s. 340(2)(b) of the NLC.

Salient Facts

[7] The events leading up to the institution of the suit, as found by the learned trial judge, are that the plaintiff became the registered owner of land held under Grant No. 53097 Lot 2788, Mukim of Petaling, Wilayah Persekutuan ('the land') on 13 September 1996. The registration number of the plaintiff is 727974-D.

[8] On or about 15 October 2004, an impostor company, apparently bearing a name identical to that of the plaintiff, but with a different company number, namely 9048-D, applied to the PTG for a replacement issue document of title alleging that it had lost the original document of title of the land. The original document of title was at all material times in the possession of the plaintiff.

[9] In actuality the impostor company was named Pembangunan Bersatu Sdn Bhd. However, in its application to the PTG the impostor company appended a falsified copy of the results of a company search purportedly carried out at the Companies Commission of Malaysia.

[10] On 19 May 2005, the PTG issued a replacement issue document of title described as Grant No. 9971, Lot No. 2788, Mukim of Petaling, Wilayah Persekutuan.

[11] On 23 January 2006 the impostor company entered into a sale and purchase agreement to sell the land to the immediate purchaser, Chai Sit, for the sum of RM680,000. The sale was completed on or around 31 May 2006, after which the immediate purchaser was registered as the owner of the land.

[12] On 25 August 2006, some three months later, the immediate purchaser entered into a sale and purchase agreement with the first defendant, the appellant here. The purchase price for this second sale was stated to be RM900,000. However an additional sum of RM870,000, stated to be for the costs of earthworks, was paid by the first defendant to Chai Sit. The learned judge in his grounds has set out further evidence relating to this transaction, which was relevant to his subsequent findings.

[13] On 25 September 2006, prior to the completion of this second sale of the land, the impostor company entered a private caveat, stating that Chai Sit, the immediate purchaser, had not settled the balance of the purchase price.

[14] A notice in Form 19G, for the withdrawal of the impostor company's private caveat, dated 20 December 2006, was procured by Chai Sit's solicitors from the impostor company's solicitors.

[15] On 28 December 2006 the first defendant, through its solicitors, presented the memorandum of transfer for registration of the land in its name, together with the Form 19G and other relevant documents. However, registration was not effected in the name of the first defendant, as on 27 March 2007, the impostor company caused a Registrar's caveat to be entered against the land, on the grounds that the withdrawal of the private caveat had been done without its knowledge. It further maintained its grievance that it had not received the balance purchase price from Chai Sit.

[16] The plaintiff subsequently discovered that the land was being cleared. A land search was conducted by the plaintiff's solicitors, which showed, *inter alia*, that Chai Sit was the registered proprietor of the land and that there was another pending transfer submitted on 28 December 2006. The search also disclosed the presence of the Registrar's caveat on the title.

[17] On 24 April 2008 the plaintiff lodged a police report stating that it had never sold the land and that the original issue document of title was still in its possession. The plaintiff also notified the PTG. As a consequence, the PTG advised the plaintiff that it would be conducting an investigation into the transfers.

[18] This took the form of an enquiry on 7 November 2008. The plaintiff, Chai Sit and the first defendant through their representatives were all present at this meeting. So were the police, who requested that Chai Sit and its solicitors provide statements to assist in the investigation. Documents were also taken from them. However, there are no minutes nor other records in the PTG's possession disclosing any outcome to this investigation.

[19] Soon after this meeting, Chai Sit applied to court to have the Registrar's caveat removed. PTG was named as a respondent in the originating motion filed on or about 7 January 2009. The first defendant intervened and was added as a party. The plaintiff was never informed, nor made a party to these proceedings. PTG did, in its affidavit, maintain that the plaintiff ought to be joined as a party in those proceedings, as it had an interest in the land. The relevant portion of the affidavit has been set out in the judgment of the learned trial judge and is reproduced here:

> 9. Saya sesungguhnya menyatakan bahawa saya juga dinasihatkan oleh Peguam Kanan Persekutuan yang mengendalikan kes in bahawa pihak Pembangunan Orkid Desa Sdn Bhd seharusnya dijadikan suatu pihak dalam prosiding ini supaya semua pihak yang berkepentingan boleh mengemukakan fakta yang material dan relevan berhubung dengan kemasukan Kaveat Pendaftar dan diberi peluang untuk didengar dalam prosiding ini.

[20] The learned trial judge further points out in his judgment that the PTG would not have been aware at this juncture that there were two companies claiming to be the "original owner".

[21] However, the significant point that arises from this is that this application to have the plaintiff joined as a party was opposed, not only by Chai Sit, but also by the first defendant. As a consequence, the entire matter was disposed of, without the plaintiff being accorded an opportunity of being heard. It must be recalled that this was well after the meeting called by the PTG on 7 November 2008 in relation to the dispute over title in relation to the land.

[22] At this juncture, Chai Sit and the first defendant were well appraised of the plaintiff's claim as the original owner of the land, who had no knowledge of any dealing with Chai Sit. They were also aware of the police investigation, as statements and documents had been procured by the police from Chai Sit and its solicitors. The plaintiff contends that the facts relating to the police report and investigation in relation to the land were not disclosed to the court.

[23] On 19 November 2009, the High Court granted Chai Sit's application to remove the Registrar's caveat. The caveat was removed on 22 January 2010.

[24] The first defendant was then registered as the proprietor of the subject land on 11 February 2010, but with effect from the date on which the memorandum of transfer was originally presented, namely 28 December 2006.

[25] On 7 September 2012 the plaintiff lodged a private caveat over the land. As stated by the learned trial judge, the evidence adduced at trial disclosed that the director of the plaintiff who had attested to the affixing of the common seal of the plaintiff on the Form 19B for the lodgment of the caveat was bankrupt at the material time. This led to the caveat being removed by the PTG. The first defendant, by way of counterclaim, sought damages against the plaintiff for wrongful entry of the private caveat. It claimed to have suffered losses as a consequence of such entry.

[26] The learned trial judge has summarised this chronology of transactions in a diagram in his judgment, which is most useful.

The Judgment Of The High Court

[27] As stated earlier, the learned trial judge allowed the plaintiff's claim. In the context of the first defendant's appeal, the learned judge concluded that as the transfer of the land to Chai Sit was effected pursuant to a forged instrument by the impostor company, Chai Sit's title was defeasible under s. 340(2)(b) of the NLC. It will be recalled that the land was then transferred by Chai Sit, the immediate purchaser, to the first defendant, the subsequent purchaser, on 11 February 2010, but with effect from 28 December 2006.

[28] Applying s. 340(3) the learned judge concluded that the first defendant's title would also be defeasible unless it could avail itself of the proviso to s. 340(3) of the NLC, namely that it was a purchaser in good faith and for valuable consideration. The burden of establishing so fell on the first defendant. He went on to conclude that the first defendant had failed to establish that it fell within the purview of the proviso to s. 340(3).

[29] The learned judge also offered another basis for failing to allow the first defendant's claim. He found that the sale and purchase agreement between Chai Sit and the first defendant was void *ab initio* pursuant to s. 24(b) of the Contracts Act 1950 because the said agreement had the "effect of evading the payment of real property gains tax on undeclared profit and the payment of stamp duty on the additional consideration".

[30] This conclusion, in turn, was reached as a consequence of the finding that the real consideration or purchase price for the land between the parties was RM1,770,000 and not RM900,000 as stated on the sale and purchase agreement. The first defendant had in fact paid Chai Sit the sum of RM870,000-00 for earthworks that had not been carried out as of the date of trial by Chai Sit. It was therefore concluded that Chai Sit and the first defendant had "colluded to evade the payment of real property gains tax on the undeclared profit and the payment of stamp duty on the additional consideration of RM870,000". Prior to this, the learned trial judge had made

findings to the effect that the earthworks payment of RM870,000 was not a genuine payment for services to be provided by Chai Sit, but was a means to suppress the documented purchase consideration of the land. In his judgment, the reasons for so concluding are set out.

[31] As this second agreement between Chai Sit and the first defendant was void *ab initio*, the trial judge concluded that the transfer of title from Chai Sit to the first defendant was procured by means of a void instrument rendering the title defeasible under s. 340(2)(b) of the NLC.

[32] In reaching his conclusions as to whether the first defendant was a purchaser in good faith for valuable consideration within the meaning of the proviso to s. 340(3) of the NLC, the learned trial judge considered the following issues which he had formulated as being the determinative issues:

(a) When is the *bona fides* of a purchaser ascertained for the purposes of s. 340(3) of the NLC?

(i) is the relevant time at which good faith is to be ascertained the time at which the transaction was entered into by the purchaser, or the time at which it was registered as proprietor;

(ii) whether good faith meant simply the absence of fraud, deceit or dishonesty, or whether a purchaser was under a positive duty to take the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances before it may be considered to be *bona fide*.

(b) Whether the sale and purchase agreement between the immediate purchaser, Chai Sit, and the subsequent purchaser, the first defendant, had the effect of depriving the state of revenue and was therefore void *ab initio* pursuant to s. 24(b) of the Contracts Act 1950, rendering the first defendant's title defeasible under s. 340(2)(b) of the NLC.

[33] These matters comprise the relevant issues for consideration in this appeal in relation to the learned trial judge's finding that:

(a) the first defendant was not a purchaser in good faith and for valuable consideration and was thus disentitled to an indefeasible title to the land pursuant to s. 340(3);

(b) the transfer of title to the first defendant was defeasible under s. 340(2) as it was predicated on a contract which was void under s. 24(b) of the Contracts Act 1950.

The Appeal

[34] It should be pointed out here that it was not in issue that the transfer of title pursuant to the first sale and purchase agreement between the impostor company and Chai Sit was defeasible. This follows from our system of deferred indefeasibility, as opposed to immediate indefeasibility

(see *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269). Under the principle of deferred indefeasibility where registration of a title has been obtained by fraud or by use of an insufficient instrument or a void instrument, the person in whose name the transfer was effected, does not obtain a defeasible title. That would be Chai Sit in the context of the present case. Here, the issue was whether the subsequent transfer to the first defendant as purchaser gave it indefeasible title on the grounds that the first defendant was a purchaser in good faith for valuable consideration.

[35] In reviewing the learned trial judge's comprehensive and well-reasoned judgment, we considered the sub-issues set out in para. 25 of his judgment in order to determine whether the first defendant, as a subsequent purchaser, was one in good faith for valuable consideration. The first sub-issue relates to the time at which the *bona fides* of a purchaser is to be ascertained for the purposes of the proviso.

[36] The issue is material because in the present case the first defendant entered into the sale and purchase agreement with Chai Sit on 25 August 2006. At that juncture, there was no evidence to suggest that the first defendant was aware of the plaintiff and its claim over the land. The first defendant only came to know about the plaintiff at a subsequent time, either upon entry of the Registrar's caveat in or around 27 March 2007 or at the very latest on or by 7 November 2008, when a meeting was called by the PTG in relation to the plaintiff's complaint relating to improper dealing in relation to the land. The first defendant's representative was present at the meeting.

[37] Therefore the issue considered by the court below was whether the relevant time to assess the "good faith" of the first defendant was on 25 August 2006, at the time of the signing of the sale and purchase agreement, or on the date of registration namely 11 February 2010 but dating back to the date of presentation, namely 28 December 2006.

Issue (1): When Is The Relevant Time To Determine Whether A Subsequent Purchaser Acquires Title "In Good Faith For Valuable Consideration" For The Purposes Of The Proviso To s. 340(3)?

[38] It was urged by learned counsel for the appellant that the facts in *Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637; [1998] 3 MLJ 346 ('*Ong Ban Chai*') are closely similar to the facts in the instant appeal, and that the learned judge erred in failing to abide by the decision of this court in that case. It was further submitted that the relevant time at which *bona fides* was to be assessed, as decided in the case of *Ong Ban Chai (supra)* was the time of the transaction, namely, when the second sale and purchase agreement was entered into between Chai Sit and the first defendant on 25 August 2006 and not on the date of registration of title. Alternatively, it was contended that the relevant date of registration was 28 December 2006 when the relevant documents were presented for registration.

[39] The case of *Ong Ban Chai* (*supra*) relates, *inter alia*, to an agreement for sale of a half share in three lots of land and an irrevocable power of attorney, all of which were alleged to be granted by the respondent in that appeal, to the first appellant there, as security for friendly loans. The first appellant further contended that as the respondent was unable to repay his debt, the respondent had agreed orally to treat those loans as a set-off against the selling price for the respondent's half share in the land. The respondent denied agreeing to this arrangement. The loans remain unpaid. As a consequence, the power of attorney was later utilised by the first appellant without the knowledge of the registered proprietor, and the half share transferred to himself. He then sold this half share in the three lots of land to the second and third appellants. The respondent then entered a private caveat against the land, which was removed by the Registrar of Titles.

[40] The High Court gave decision in favour of the respondent and ordered that the said share in the three lots of land be registered in the respondent's name. The appellants collectively appealed against the decision to this court. One of the issues before this court was whether the second and third appellants and their nominee, the fourth appellant (who was their solicitor) were *bona fide* purchasers of the undivided half share sold by the first appellant.

[41] This court, in that case, found that the second and third appellants, and hence their nominee the fourth appellant were subsequent or deferred purchasers who had acquired the properties in good faith and for valuable consideration. In so holding, this court upheld the principle of deferred indefeasibility.

[42] Apart from the issue of *bona fides* or good faith, this court also considered the issue of whether, in order to fall within the definition of 'purchaser' in the proviso to s. 340(3), it was necessary to have paid the full purchase price.

[43] In the course of their judgment, and premised on the facts of the case, this court stated *inter alia* as follows:

> … In coming to our decision we had the advantage and benefit of the judgment of the Federal Court consisting of five judges in the case of *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 MLJ 465. …
>
> …
>
> This case has been hailed to be a landmark judgment of the Federal Court where it rejected the proposition that one is not a *bona fide* purchaser unless one has paid the full purchase price under the contract of sale as propounded by the Court of Appeal in the *Aik Ming* case, on which the learned trial judge had based his decision. The Federal Court decided that to be a *bona fide* purchaser one should have contracted in good faith for value, and that knowledge of an adverse claim is not fraud. The material

time is the time of the transaction. We observe that the Federal Court found in favour of the intervener/purchaser ie the appellant company, which paid the balance of the purchase price when the second caveat was still subsisting. Delivering the judgment of the Federal Court, Edgar Joseph Jr FCJ said at p. 508:

> The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. (see *Kanssen v. Rialto (West End) Ltd* [1944] Ch 346; *Morris v. Kanssen* [1946] AC 459.)

...

The decision of the Federal Court is binding on us, the Court of Appeal and the courts below ...

[44] In the present appeal, learned counsel for the first defendant submitted both here and in the court below that based on the decision above, where it was stated that in order to ascertain the good faith or *bona fides* of a purchaser in relation to an adverse claim, the relevant time to do so is the time of the transaction. In the instant case, that would mean at the time when registration was sought, ie, 28 December 2006, or arguably even earlier, when the sale and purchase agreement was executed on 25 August 2006, as the Federal Court relied on English cases which stipulated that the relevant time is the time of entry into the transaction.

[45] It would follow then that all matters and facts coming to light or to the express notice of the subsequent or deferred purchaser either on 28 December 2006, or earlier on 25 August 2006, and indeed his acts and omissions thereafter, would be of no consequence for the purposes of determining his "good faith".

[46] Counsel for the first defendant maintained that as the first defendant is a subsequent purchaser and had no knowledge of the plaintiff's claim to the land at the time of the execution of the sale and purchase agreement, it was indeed a purchaser in good faith for valuable consideration. It was further pointed out that the full purchase price had been paid at the time when the purchaser sought registration in December 2006.

[47] For the plaintiff, on the other hand, learned counsel disputed this stance maintaining that the first defendant's conduct subsequent to it having notice of the plaintiff's claim was sufficient to establish that the first defendant was not *bona fide* and not a purchaser "in good faith". Reliance was placed on the first defendant's knowledge of the plaintiff's claim pursuant to the lodgment of the Registrar's caveat, the meeting held at the PTG's offices in 2007 and the proceedings taken by Chai Sit to remove the Registrar's caveat, to which the first defendant was a party. The first defendant had opposed the application made by the Registrar to have the plaintiff joined as a party.

[48] The learned judge relying on *Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1981] 1 LNS 114; [1982] 2 MLJ 53 held that the relevant time to ascertain whether the first defendant was a purchaser in good faith for valuable consideration, was only upon registration, at which point the first defendant became the registered proprietor.

[49] The learned judge stated that as the reasoning of this court in relation to the relevant time to ascertain the *bona fides* of a purchaser did not form a part of the *ratio decidendi* of *Ong Ban Chai (supra*, as it was not an issue there, he was entitled to depart from the *dicta* of the Court of Appeal on that basis, and conclude that the relevant time was at registration. He further reasoned that the wording in the proviso utilised the word "acquired by the purchaser", and acquisition did not occur until registration.

[50] In adjudicating on this issue of the relevant time to assess whether a purchaser for the purposes of s. 340 is one "in good faith and for valuable consideration", we perused and considered both the case of *Ong Ban Chai (supra)* and the judgment of the Federal Court in the case of *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793. The latter is binding on us.

[51] Upon doing so, it became apparent that the excerpt relied upon by this court in adjudicating on the case of *Ong Ban Chai (supra)* referred specifically to that portion of Edgar Joseph Jr FCJ's decision relating to the "material time at which there must be knowledge or means of knowledge is the time of entry into the transaction" which may be referenced at p. 508 of the judgment as reported in the *Malayan Law Journal*.

[52] A perusal of that part of the judgment in the case of *Pekan Nenas (supra)* however discloses that the Federal Court was adjudicating specifically on the relevant time at which the rule in *Turquand*'s case[1] was to be invoked and utilised. Although the key question in the appeal was whether the appellant there was a *bona fide* purchaser for value, one of the two main issues considered related to whether the purchaser there had, at the time of entry into the transaction for the sale and purchase of the subject properties, notice of alleged irregularities and the alleged invalidity, in particular, of the meeting of a family company held some time before the entry into the sale and purchase agreement for the subject land. This was pertinent because the family company was the vendor and it was at the meeting that authorisation for the sale of the subject properties was obtained. Both the High Court and the Court of Appeal had concluded that the resolutions passed at that family meeting, more particularly the resolution authorising the sale of the subject properties by the family company to the purchaser Pekan Nenas, were null and void. Consequently, a declaration was granted by the High Court setting aside the sale of the disputed properties to the purchaser. This was upheld by the Court of Appeal.

[53] The Federal Court however held otherwise, reasoning that unless there was proof that the purchaser knew or ought to have known of the irregularities with regard to the family meeting, the purchaser was entitled to rely on the rule in *Turquand*'s case. The Federal Court then went on to discuss the law relating to when the rule in *Turquand*'s case could and could not be invoked. It was in the context of the circumstances when the rule in *Turquand*'s case cannot be invoked by an outsider who has notice or who ought to have notice that the Federal Court held that the relevant time to ascertain whether *Turquand*'s rule came into play was "the time of entry into the transaction".

[54] A fuller portion of the case of *Pekan Nenas (supra)* needs perusal and consideration in order to comprehend the context of the statement of Edgar Joseph FCJ in this context:

> ... So also, an outsider dealing with a company cannot invoke the benefit of the *Turquand* rule if he could or should in the circumstances have discovered the defect by inspecting the compulsory documents filed at the Registry of Companies which are open to public inspection. (see *Irvine v. Union Bank of Australia* (1877) 2 App Cas 366.)
>
> The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. (see *Kanssen v. Rialto (West End) Ltd & Ors* [1944] Ch 346; *Morris v. Kanssen & Ors* [1946] AC 459.)
>
> We need hardly add that the rule in *Turquand's* case is designed to protect not the company itself but persons dealing with the company. It follows that there is no reason why persons, including outsiders, who enter into transactions with a company, and who are sued should not invoke the benefit of the rule as a defence. (see *Howbeach Coal Co Ltd. v. Teague* (1860) 5 H &N 151, 157 ER 1136; *Garden Gully United Quartz Mining v. McLister* (1875) 1 App Cas 39.) ...

[55] From the foregoing, it is apparent that the statement of the Federal Court relied on by this court in the case of *Ong Ban Chai (supra)*, holding effectively that the relevant time to assess the good faith of a purchaser in s. 340, is, with respect, inaccurate or erroneous. Although it is indeed true that the key issue in the case of *Pekan Nenas (supra)* was whether the purchaser there was one who had acted in "good faith" and for "valuable consideration", the issue of good faith related primarily to whether the purchaser was entitled to rely on *Turquand*'s rule to establish that it had no knowledge of the irregularities within the vendor company, and to that extent was therefore, *bona fide*. It was in that context that it was held that the relevant time for the application of *Turquand*'s rule was the time of entry into the transaction.

[56] That is quite different from holding that in order to ascertain the *bona fides* of a purchaser under s. 340, the relevant time is that of entry into a transaction, or at the time of a transaction.

[57] The statement of this court in the case of *Ong Ban Chai (supra)* does not form the *ratio decidendi* of that case. The issue as to the time at which the *bona fides* of a purchaser is to be ascertained did not comprise an issue for determination. It comprises *obiter dicta*. As such, we are not bound by that decision in the context of the particular sub-issue we are dealing with. Neither was the learned trial judge.

[58] Therefore he did not err when he held that he was entitled to depart from the case of *Ong Ban Chai (supra)* on the basis that the statements there were *obiter* in relation to the issue of the relevant time at which the *bona fides* of a purchaser is to be assessed for the purposes of s. 340(3).

[59] We concur with the learned trial judge that the relevant time at which to determine whether a purchaser is indeed a purchaser for good faith and valuable consideration would be upon registration as title is only acquired at that point (see the case of *Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors (supra)*).

[60] The period prior to registration would therefore be relevant. In other words, cognizance may be taken of acts and omissions over the period prior to the entry into the sale and purchase transaction for the subject land, up to the point in time when the purchaser is registered as a proprietor on the register of titles. For the purposes of the instant case, therefore, events up to the actual registration of the first defendant as the registered proprietor on 11 February 2010 would be relevant, notwithstanding that the registration is stated to date back to 28 December 2006.

[61] This is because it would be difficult and inequitable to simply ignore the events between 28 December 2006 and 11 February 2010. Those are events that enabled the first defendant to become registered as the proprietor. Without a consideration of those relevant events, it would not be apparent how the first defendant became the registered owner some three and a half years after presenting all the relevant documentation for registration.

[62] Secondly, the essence of the Torrens system as encapsulated in our National Land Code is the doctrine of an indefeasible title arising solely by registration (see Raja Azlan Shah CJ (Malaya) in *PJTV Denson (M) Sdn Bhd v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136, FC; *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224 at 231; and *Teh Bee v. K Maruthamuthu* [1977] 1 LNS 134; [1977] 2 MLJ 7 at 10). As succinctly stated by Barwick CJ in *Bresknar v. Wall* (1972) ALJR 68, 70:

> The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration.

And as observed by Lord Wright in *Abigail v. Lapin* [1934] All ER 720, the Torrens system "... is a system for the registration of title, not of deeds; the statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title ... to the transferee.

[63] Until registration, therefore, a prospective purchaser, who might well enjoy beneficial ownership of the land (having paid the full purchase price), is not recognised as holding title or becoming the registered proprietor until registration. It has been said in such cases that the vendor, namely Chai Sit, then holds the land as bare trustee for the purchaser, the first defendant. The trust arises by the application of equitable principles, but do not alter the basic concept of the NLC, which treats the purchaser's "equity" as a claim to an unregistered, although registrable interest. The purchaser may seek to lodge a caveat to protect this interest on the register, but it is only upon registration that the purchaser will become the registered proprietor (see *The National Land Code: A Commentary* by Judith Sihombing, published by Lexis Nexis in 2009).

[64] Therefore prior to registration, which actually occurred on 11 February 2010, the first defendant had no title to the land. It remained a purchaser (*albeit* beneficial owner) until registration. Accordingly, it would follow that its conduct until registration is material for the purposes of ascertaining *bona fides* or "good faith". The fact that the registration was backdated, as it were, as explained earlier, does not mean that the conduct of the first defendant, as purchaser, subsequent to the presentation of documents for registration, is to be ignored.

[65] For the reasons above, we are of the view that the learned trial judge concluded correctly that the relevant time to ascertain whether the first defendant was a purchaser in good faith for valuable consideration was at or until the time of actual registration in February 2010. This means that all conduct after the first defendant became appraised of the plaintiff's claim to the land is relevant, as held by the trial judge. As such we are unable to concur with learned counsel for the first defendant that the trial judge was plainly wrong (see the decision of the Court of Appeal in *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665 and two English Supreme Court cases of *Henderson v. Foxworth Investments Limited* [2014] UKSC 41 and *Carlyle v. Royal Bank of Scotland Plc* [2015] UKSC 13.)

The Case Of *Ong Ban Chai*

[66] Although indefeasibility is not directly in issue here, we feel constrained to comment on this aspect of the case here. It is moot whether the conclusion of this court in the case of *Ong Ban Chai (supra)* applies to immediate or deferred indefeasibility. The decision was made prior to that of the Supreme Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 241. Therefore s. 340 of the NLC was, at that time, correctly understood to confer deferred indefeasibility, rather than immediate indefeasibility.

[67] It will be recalled that in the case of *Ong Ban Chai (supra)*, the party, namely the first appellant there, had wrongfully and fraudulently transferred the respondent's half-share into his name in respect of three lots of land, and then on-sold the said half-share in the three lots to the fourth appellant who was a nominee for the second and third appellants.

[68] Under the deferred indefeasibility doctrine or theory, there are notionally three classes of parties, firstly, the original owner, secondly, the intermediate owner, who is the person who dealt with the fraudster, and thirdly the deferred owner, who is a party acting in good faith for valuable consideration who is ignorant of the fraud and who takes from the intermediate owner. In these circumstances, applying s. 340, only the deferred owner defeats the original owner's title (see *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1, *Lawrence v. Maple Trust Company*, 2007 ONCA 74 at paras. 14 – 23).

[69] Applying the deferred indefeasibility doctrine as encapsulated in s. 340 of the NLC to the fact scenario in the case of *Ong Ban Chai (supra)*, it follows that the fourth appellant, who was a nominee for the second and third appellants, acquired title from the "fraudster", namely the first appellant. As such the fourth appellant, as nominee for the second and third appellants and they themselves, are in fact the intermediate or immediate purchasers, rather than deferred purchasers. As such, applying the theory of deferred indefeasibility, title in their hands would be defeasible as against the original owner of the half-share in the three lots.

[70] However the second, third and fourth appellants were in fact treated as subsequent or deferred purchasers in good faith for valuable consideration. By treating them as such, the doctrine or theory of immediate indefeasibility was applied, rather than deferred indefeasibility as envisaged under the Code. This may not, with great respect, be the correct approach to adopt.

[71] With immediate indefeasibility, even if the instrument of registration is void, or the title acquired by fraud, it gives the immediate purchaser good title upon registration, provided that the immediate purchaser is acting in good faith without notice of the fraud. This system of land title is designed to protect innocent parties such as purchasers and lenders (banks) that rely entirely on the register.

Does Good Faith Mean Simply The Absence Of Fraud, Deceit Or Dishonesty, Or Whether A Purchaser Is Under A Positive Duty To Take The Ordinary Precautions That A Reasonably Prudent Purchaser Would Have Taken In The Circumstances Before It May Be Considered To Be Bona Fide?

[72] This sub-issue relates to the scope of the definition of "good faith" in the proviso to s. 340, in relation to a subsequent purchaser who takes from an intermediate party who in turn has land pursuant to a fraudulent or forged transfer and whose title is therefore defeasible.

[73] Learned counsel for the appellant once again relied on the case of *Ong Ban Chai (supra)* to contend that mere knowledge of the existence of litigation and an adverse claim was insufficient to impeach the title of the first defendant, a *bona fide* purchaser for value. In the case of *Ong Ban Chai (supra)*, this court, applying the doctrine of deferred indefeasibility, concluded that the purchasers, namely the second, third and fourth defendants (where the fourth defendant was a nominee for the other two) were *bona fide* purchasers in good faith for valuable consideration, on the facts of that case.

[74] The issue for consideration in the instant case is whether on the factual matrix before the learned trial judge, the first defendant was, in fact, a *bona fide* purchaser for value. It is trite that the issue of *bona fides*, or of good faith is a question of fact in each case (see the case of *Pekan Nenas (supra)*). However the nub of the first defendant's submission was that the definition of "good faith" or "*bona fide*" was spelt out in in the case of *Ong Ban Chai (supra)* and that the trial judge was bound to follow that definition, and in failing to do so had erred.

[75] The trial judge as we have stated above, opined that there were two threads of authorities in relation to the meaning of "good faith":

(a) Cases such as *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167; [2005] 2 MLJ 589 which held that good faith means an absence of fraud, deceit or dishonesty;

(b) More recent cases such as *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 which have imposed a positive duty on purchasers to undertake investigations and/or precautions ordinarily taken in the course of purchasing land.

[76] The trial judge opted for the more recent line of cases such as *Au Meng Nam (supra)*. He held that in the case of *Ong Ban Chai (supra)* there was a conflation of the concepts of fraud and the absence of good faith. He then went on to fully consider the facts before him, prior to concluding that the conduct of the first defendant had not acted in good faith and therefore did not fall within the purview of the proviso to s. 340(3).

[77] In these circumstances, it falls to be considered whether the learned trial judge erred:

(a) in his consideration of the meaning of "good faith" in relation to a purchaser; and

(b) in his conclusion that the first defendant was not a purchaser "in good faith" on the factual matrix of this appeal.

A **Definition To Be Accorded To "Good Faith"**

[78] In the case of *Ong Ban Chai (supra)* this court construed the Latin term "*bona fide*" as found in legal dictionaries and concluded that it meant an absence of fraud, deceit or dishonesty. It was held that the expression 'good faith' in English is used synonymously with the Latin expression '*bona fide*'.

B

[79] Later on in the judgment the court went on to cite excerpts from the case of *Pekan Nenas (supra)* and considered the statements of Edgar Joseph Jr FCJ in relation to the effects on a purchaser of knowledge of litigation and adverse interests in relation to the title to be acquired.

C **[80]** More specifically the Federal Court cited the facts of *Waimiha Sawmilling Co (in liquidation) v. Waione Timber Co Ltd* [1923] NZLR 1137; (1923) 25 GLR 353 to make the point that the taking of title in the face of pending litigation and with knowledge of it did not amount to actual fraud on the part of a prospective purchaser.

D **[81]** The court went on to hold that "... *The Waimiha Sawmilling* case is a good illustration of the proposition that the effect of notice of an unregistered interest may not amount to fraud sufficient to defeat a registered proprietor's title". (see p. 526 of the case of *Pekan Nenas (supra)* at H).

E **[82]** It is clear from the foregoing that the Federal Court was dealing with the issue of fraud under s. 340(2)(a) rather than the definition of '*bona fide*' or 'good faith' in relation to a purchaser as envisaged under the proviso to s. 340(3). In point of fact the precise issue that was considered by the Federal Court was the question of whether mere knowledge of an unregistered claim or interest could amount to fraud within the meaning of s. 340(2)(a) of the

F NLC (see p. 524 of the case of *Pekan Nenas (supra)*). Applying the case of *Waimiha Sawmilling (supra)* and the test propounded by Lord Lindley in *Assets Co Ltd v. Mere Roihi* [1905] AC 176, the Federal Court concluded that such knowledge was insufficient to amount to fraud, unless it was demonstrated that there had been a deliberate and dishonest attempt to

G deprive the unregistered claimant of his claim or interest in the land (following *Loke Yew v. Port Swettenham Rubber Co Ltd* [1913] AC 491 (Privy Council).

[83] It would therefore appear that this court in *Ong Ban Chai*'s case, had indeed construed the test for fraud under s. 340(2)(a) as being applicable in

H ascertaining whether a purchaser was *bona fide* or exhibited 'good faith'. This is, with great respect, erroneous. Therefore the trial judge did not err when he concluded that the court had conflated the concepts of fraud and a *bona fide* purchaser under the proviso to s. 340(3).

I **[84]** It would be erroneous to equate the test applicable to establish fraud under s. 340(2)(a) so as to defeat the title of a registered owner, to the assessment of a purchaser in good faith under the proviso to s. 340(3).

[85] We are therefore unable to concede to the submission of learned counsel for the first defendant that the decision of this court in the case of *Ong Ban Chai (supra)* should be adhered to.

[86] As for the relevant test to be applied in ascertaining whether a purchaser is one in 'good faith', suffice to say that the Federal Court briefly considered this issue in the case of *Pekan Nenas (supra)*. More specifically, the apex court (at p. 530H) considered the definition of a "*bona fide* purchaser" in the course of answering the question before them, namely whether a person is disqualified from being a *bona fide* purchaser for value if he has not paid the full purchase price under the contract of sale, regard being had to s. 26(b) of the Specific Relief Act 1950 (which does not fall for consideration here). And this is what the Federal Court said in relation to the definition of 'good faith':

> ... When, as here, the question arises whether a person dealing with a company has contracted in good faith, there is no qualification on the definition of purchaser, all that is necessary is that he should have contracted in good faith and have given value. In our view, for this purpose, the common law definition of who is a *bona fide* purchaser is applicable and, for this, we would refer to *Hunt v. Frip* [1898] 1 Ch 675 cited to us during the argument where Byrne J said this (at p. 682):
>
> > I do not, therefore, except so far as it affects the conduct of the plaintiffs, propose to consider whether Emery was dealing fairly or otherwise, or whether he left undone what he ought to have done. It has been put to me, and I think not unfairly that saying 'dealing *bona fide*' is equivalent to saying 'dealing honestly', and that what I really have to consider is, were the plaintiffs behaving honestly when they took the assignment in question from Emery?
>
> The above observation of Byrne J was approved by Bingham J in *Re Bennett ex p The Official Receiver* [1907] 1 KB 149.

[87] The foregoing passage from the case of *Pekan Nenas (supra),* citing with approval the common law definition of 'dealing *bona fide*', fits in neatly as a definition to the requirement of "good faith" in the context of a purchaser falling within the proviso to s. 340(3) of the NLC. It follows that the question to be asked by a court in considering this issue is whether the purchaser behaved or dealt honestly when it acquired title or an interest in land comprising the subject matter of the transaction.

[88] In determining this issue of 'good faith' or the '*bona fides*' of a purchaser such as the first defendant, as stated in numerous cases, including the case of *Pekan Nenas (supra)*, each case should be determined on its own factual matrix (see p. 531 at para. A of the case of *Pekan Nenas (above)*). This, in fact, is what the learned trial judge did in the instant case.

[89] His Lordship took into account the entirety of the salient facts and concluded that the first defendant was not a *bona fide* purchaser. The following facts were taken into consideration:

(a) The first defendant knew of the existence of the plaintiff and its claim to the land by reason of the meeting held at the premises of the PTG on 7 November 2008. This was prior to the first defendant becoming the registered proprietor on 11 February 2010 (*albeit* with effect from 28 December 2006);

(b) As representatives from Chai Sit, the plaintiff and the first defendant, not to mention the police and staff of PTG were present, the learned judge found that it was "inconceivable" that the first defendant was unaware that the plaintiff was asserting rights over the land;

(c) Soon after this meeting with the plaintiff, Chai Sit instituted proceedings against the PTG to remove the Registrar's caveat. The first defendant intervened as a party. The PTG sought to have the plaintiff made a party to these proceedings as the plaintiff clearly had an interest in the land, but both Chai Sit and more pertinently, the first defendant objected to such application. The net result was that the plaintiff was not a party to the proceedings for the removal of the Registrar's caveat, and was denied of an opportunity to be heard. The further consequence was that the court in those proceedings ordered that the Registrar's caveat be cancelled. As a consequence the first defendant was then able to effect registration and thereby acquire title to the land;

(d) The learned judge concluded that by resisting the application to add the plaintiff as a party to these proceedings to remove the Registrar's caveat, the first defendant had not acted in good faith. He went further to hold that a person acting in good faith, or honestly would have taken steps to ascertain who the true owner was. Even if there was confusion over the impostor company and the plaintiff it was evident that there were serious rival claims to the land;

(e) The first defendant did not adduce evidence to show that it had attempted to ascertain the reason for the lodgement of the Registrar's caveat, despite having knowledge of the same;

(f) The first defendant was prepared to wait for more than three years prior to registration being effected, despite having paid RM1.77 million for the land.

[90] We have perused and considered carefully the lucid and clear reasoning of the trial judge in relation to this issue and are in full agreement with the construction he has placed on the cumulative facts in arriving at his decision that the first defendant was not a purchaser in good faith. Viewed objectively, it is evident that the conduct of the first defendant served to

obstruct the plaintiff from having its claim to the land ventilated in full. The net effect was to the first defendant's advantage as it thereby procured registration, which is equivalent to acquiring title free of encumbrances.

[91] In other words, the first defendant acted so as to stifle the plaintiff's claim, particularly in precluding the plaintiff the opportunity to be heard. This amounts to a breach of natural justice. If the court adjudicating on the removal of the Registrar's caveat had been made aware of the plaintiff's claim to the land and the pending police investigation, it remains moot whether the Registrar's caveat would indeed have been removed.

[92] In this context, it is significant that the Registrar's caveat was lodged in respect of improper dealing with the land (see s. 32(1)(a) of the NLC). It cannot simply be dismissed as an adverse claim, which did not affect the first defendant's entitlement to registration. Such conduct clearly does not fall within the definition of a purchaser in 'good faith' or a purchaser who 'dealt honestly' in acquiring registration of the land in its name.

[93] In all these circumstances, we are satisfied that the trial judge did not err in his finding that the first defendant was not a purchaser in good faith, or a *bona fide* purchaser. As such, it cannot be said that the learned judge was 'plainly wrong' or failed to consider relevant facts, or took into consideration irrelevant material. He was, with respect, obviously correct in arriving at his finding. Therefore the first defendant's appeal fails on this ground.

[94] It now only remains to be considered whether the trial judge's alternative ground for holding that the first defendant's title is defeasible under s. 340(2) is correct or erroneous. This comprises the other ground of appeal, as stated at the outset.

Issue (2): Whether The Sale And Purchase Agreement Between The Immediate Purchaser, Chai Sit, And The Subsequent Purchaser, The First Defendant, Had The Effect Of Depriving The State Of Revenue And Was Therefore Void Ab Initio Pursuant To S. 24(b) Of The Contracts Act 1950, Rendering The First Defendant's Title Defeasible Under S. 340(2)(b) Of The National Land Code

[95] As explained earlier, the learned trial judge agreed with the stance of the plaintiff that the purchase price stipulated on the second sale and purchase agreement between Chai Sit and the first defendant, namely RM900,000, did not reflect the real consideration for the land. The earthworks quantum of RM870,000 was also a part of the consideration, it was found, given that despite such payment at the outset of the sale and purchase agreement, no earthworks had been undertaken as of the date of trial, several years later. As such it was concluded by the trial judge that Chai Sit and the first defendant had colluded with each other to evade the payment of real property gains tax on the undeclared profit, and payment of stamp duty on the additional consideration.

[96] This is essentially a finding of fact. The learned judge had the audio-visual advantage of making this assessment, based on the testimony of the witnesses and their credibility under cross-examination, coupled with the relevant documentary evidence and the surrounding facts. It cannot be said that such a finding of fact was arbitrary, or unsupported by facts. It was a finding premised on an issue raised by the plaintiff at trial. It cannot be said in these circumstances that the learned trial judge was "plainly wrong" in arriving at such a finding of fact. Even if we were not in agreement with such a finding, that in itself would be insufficient to warrant interference from this, the appellate court. This court would have to be satisfied that the finding was so far unwarranted in the context of the documentary and oral evidence and surrounding facts, that it reached the threshold of being plainly wrong or misconceived. That is not the case here.

[97] It followed from this finding of fact that the trial judge was satisfied that Chai Sit and the first defendant had sought to, and succeeded in evading payment of both real property gains tax as well as stamp duty. Such an agreement, in turn, had the effect of depriving the Government of revenue. As such, relying on the cases of *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674, the Privy Council case of *Palanippa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115; [1962] 1 MLJ 143 and *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457, the learned trial judge concluded that this second sale and purchase agreement was void *ab initio* pursuant to s. 24(b) of the Contracts Act 1950. The case of *Keng Soon Finance (supra)* was cited as authority for the proposition that although the plaintiff had not pleaded illegality, it was incumbent upon a court to take notice of the illegality of any agreement. The reasoning for this conclusion has been fully and comprehensively set out in the learned judge's judgment, and does not warrant repetition here.

[98] In relation to title or ownership of the land, the learned judge concluded that as the second sale and purchase agreement was void pursuant to s. 24(b) of the Contracts Act 1950, the transfer from Chai Sit to the first defendant was obtained by means of a void instrument, which rendered the first defendant's title to the land defeasible pursuant to s. 340(2)(b) of the NLC.

[99] We are in agreement with the learned judge in his conclusion that an agreement to deprive the Government of revenue is void *ab initio.* Such a conclusion is indeed supported by the various cases cited above. The issue that falls for consideration is whether a void instrument as stipulated under s. 340(2)(b) includes an instrument which is contrary to any written law.

[100] In *Land Law in Malaysia, Cases and Commentary* by Teo Keang Sood and Khaw Lake Tee (Singapore Butterworths 1987) the learned authors in their commentary on this section state, *inter alia*, as follows:

> … A void instrument would, however include one which is forged or which is contrary to any restriction in interest to which the land is subject or to any prohibition imposed by the Code or any written law. Examples of the latter are dealings effected in favour of or by minors (see *Tan Juan v. The Boon Keat*, …); transactions in contravention of the Moneylenders Ordinance 1951 (see *Appoo s/o Krishnan v Ellamah d/o Ramasamy, infra*, …) or Malay Reservations Registration; dealings effected in favour of foreign companies and persons who are not citizens …

[101] And in T*enure and Land Dealings in the Malay States* by David S.Y. Wong (Singapore University Press, 1975) the learned author stated:

> ... Section 340(2)(b) also provides that a registered title is defeasible where registration was obtained by means of an" insufficient or void" instrument. Unlike "forgery", the expression "insufficient or void instrument" is so wide as to defy comprehensive enumeration of the circumstances in which a purportedly executed instrument of dealing may be regarded by the court as "insufficient" or "void". Some general observations may indicate how wide its domain may be. The reference to the insufficiency and voidness of an instrument could pertain to all sorts of circumstances and matters relating to the execution of the instrument. Where the instrument is executed in pursuance of a contract of dealing the invalidity of contract (i.e. where the contract is void) would plainly entail that the instrument is void accordingly ...

[102] These commentaries are borne out by case law, for example, *Tan Hee Juan v. Teh Boon Keat* [1933] 1 LNS 101; [1934] MLJ 96 which related to an instrument of dealing effected by a minor. In holding that the transfers effected by such an instrument of dealing were void, Hereford J held, *inter alia*, as follows:

> ... The Privy Council have held that the effect of sections 10 and 11 of the Contract Act of India is that an infant cannot make a contract within the meaning of the Act and that a contract made by an infant is not only voidable but void (*Mohori Bibee v. Dharmodas Ghose* 30 Calcutta 539). That decision of the Privy Council is binding on this court, and therefore there can be no doubt whatever that those transfers are void. That being so, as the registration of these proprietors has been obtained by a void instrument, the effect of section 42(iii) of the Land Code is that the registration is void, and I have no option or alternative that I know of or can discover but to declare that registration void ...

[103] Section 42(iii) of the Land Code was the predecessor of the present National Land Code.

[104] It follows from the foregoing that in the instant case, the registration of the first defendant's title was predicated on the second sale and purchase agreement with Chai Sit, which sought to deprive the Government of revenue, and was therefore, void under the Contracts Act 1950. As the underlying contract was void, the instrument of dealing effecting the transfer to the first defendant was accordingly void. (See also *Puran Singh v. Kehar Singh & Anor* [1937] FMSLR 1 and *Halimah v. Haji Mohamed Din* [1940] FMSLR 317).

[105] Therefore, the learned trial judge, with respect, determined this issue correctly, given his findings in fact and law in relation to the second sale and purchase agreement. There is no basis whatsoever to interfere with his findings *albeit* in fact or law as was urged upon us by learned counsel for the first defendant.

[106] In all these circumstances, we were satisfied that there were no merits in the first defendant's appeal and therefore dismissed the same with costs.

Endnote:

1. *Royal British Bank v. Turquand* (1856) 6 E&B 327